No. 11005

United States
Circuit Court of Appeals
For the Ninth Circuit

CITY OF TUCSON, a Municipal Corporation,
Appellant,

vs.

THE TUCSON GAS, ELECTRIC LIGHT AND POWER COMPANY, a Corporation,
Appellee.

Appellant's Reply Brief

THOS. J. ELLIOTT,
615 Valley National Bldg.
Tucson, Arizona
Attorney for Appellant.

Upon Appeal from the District Court of the United States for the District of Arizona.

Service of the within and receipt of three copies thereof is hereby admitted this.....day of ..... A. D. 1945.

DARNELL & ROBERTSON,

By.....
Attorneys for Appellee.

TABLE OF AUTHORITIES CITED

Cases

Texts

Statutes

No. 11005

United States
Circuit Court of Appeals
For the Ninth Circuit

CITY OF TUCSON, a Municipal Corporation,
Appellant,

vs.

THE TUCSON GAS, ELECTRIC LIGHT AND POWER COMPANY, a Corporation,
Appellee.

Appellant's Reply Brief

I

Appellee's contentions in reply to Appellant's proposition of law number one to the effect that,

> "The City of Tucson has the right, power and authority to acquire by condemnation the property of the Appellee utility as described in the complaint herein"

are based upon three premises, (Appellee's Brief, pages 5 and 6) as follows:

(a) That appellant had no authority to institute the action to condemn for the reason that no election granting the authority as

required by Appellant's Charter, par. 25, chap. 4, and Arizona Municipal Revenue Bond Act of 1943, (Arizona Code, Anno. 1939, sec. 16-2601 to 16-2619 inclusive) had been held, and

(b) That the Court had jurisdiction only of Pima County property under the Arizona Eminent Domain Law, (Arizona Code, Anno. 1939, sec. 27-909), for the reason that the action was only filed in Pima County, and

(c) That Appellant by taking property of Appellee outside Appellant's corporate limits would be taking property in public use and devoting it to private use in violation of Section 27-907 Arizona Code Anno. 1939 and Section 17, Article 2, Arizona Constitution.

It is submitted that Appellee's contention concerning the requirement of holding an election before filing an action in condemnation has been fully answered by Appellant in its Opening Brief, pages 10 to 12, and that by the specific provisions of Section 16-2618, Arizona Code Anno. 1939, such an election is not necessary.

It is further submitted that the charter authority of Appellant to condemn has been delegated by the State and that

> "When a state delegates to a municipality the right to condemn private property for a public use, and does not in the act delegating such au-

> thority provide a method for its exercise, the general law of the state prescribing the procedure, and the method of ascertaining the damages is, by implication, a part of the law delegating the power."
>
> *McQuillin Mun. Corp.* 2d Ed. Revised, Volume 4, section 1654, at top of page 645.

It is further submitted that Appellant is operating under a so-called home rule or freeholders charter and that as such it cannot legislate nor act in matters of statewide concern save and except in compliance with the provisions of the statutes of the state.

State v. Jaastad, 32 Pac. (2d) 799, 43 Ariz. 458 at 463.

Appellee's contention that the court had jurisdiction only of property in Pima County overlooks the fact that the action was removed to the United States District Court by Appellee and that said court can exercise jurisdiction throughout the State of Arizona. Further, on the motion to dismiss which was before the lower court it was immaterial whether separate actions had been filed in the other counties of the state for the reason that there is no requirement that each of said actions be filed simultaneously or in any order of succession. Nor is there any statute of limitations fixing a time limit within which an action shall be brought. Appellant admits it has been unable to find any cases in point on this question.

Appellee's contention that the taking of its property outside Appellant's corporate limits would be devoting it to private use, is untenable, for, as said by the court in City of Pasadena v. Railroad Com., 183 Cal. 526, 192 Pac. 25,

> "It is not true that a city is a private corporation when carrying on a municipally owned public utility. No decision so holds. All the decisions on the subject recognize the fact that a city does not change its character by engaging in such enterprises."

The foregoing was quoted with approval by the Arizona Supreme Court in a case cited by Appellee in its brief at page 27, Menderson v. Phoenix, 51 Ariz. 280 at 289; 76 Pac. (2d) 321. See also, City of Phoenix v. Wright, 52 Ariz. 227, 80 Pac. (2d) 390 at 392, 393, points 3 and 4.

It naturally follows, therefore, that a proprietary use is as much a public use as is a governmental function a public use. It is impossible for a municipal corporation to exercise a private use of anything. It may engage in an enterprise that is in the nature of a private enterprise but in so doing it is nevertheless a public corporation operating as such for the public of which it is comprised.

In re Brooklyn, 38 N. E. 983, 26 L. R. A. 270;
Los Angeles v. Southgate, 291 Pac. 654;
Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 41 L. Ed. 1165; 17 Sup. Ct. 718;

In addition to the foregoing contentions in reply to Appellant's proposition of law number one to the effect that;

> "The City of Tucson has the right, power and authority to acquire by condemnation the property of the Appellee utility as described in the complaint herein,"

Appellee further contends that

(d) No adequate method is provided by law for valuation of utility property, for the reason that under section 27-909 Arizona Code, Annotated 1939, four different judgments as to four different parts of the operating property, without reference to their value as a whole, would result, and

(e) Valuation as of date of the summons as provided in section 27-916 Arizona Code, Annotated 1939, would deprive Appellee of compensation for extensions or additions made to property during litigation, and

(f) Proposed taking violates due process provisions of both federal and state constitutions for the reason that the Appellee can be forced to forego any relief, by annulment of the proceedings, in the event it cannot obtain the value of the property fixed by the judgment by levy or execution, under the provisions of section 27-918, Arizona Code, Annotated 1939.

The answer to Appellee's contention that no adequate method is provided for valuation of the property, is found in section 16-2603, Arizona Code, Annotated 1939, which section provides for the exercise of the right of eminent domain by a municipality in the acquisition of a public utility, subject, however, to the requirements of sections

16-604 and 16-605, Arizona Code, 1939. Said sections provide three methods for determining the compensation to be paid for the taking of private property, one of which is by a court of competent jurisdiction, sitting for that purpose,

Arizona Code, Annotated 1939, sec. 16-604 (3);

the amount to be determined being the fair valuation, which shall be the equivalent of the compensation to be paid for the taking of private property for a public use under the provisions of sections 27-907 to 27-921, Arizona Code, Annotated 1939.

It will be noted that the procedure to be followed is a judicial proceeding, and that the valuation is to be determined by either court or jury after hearing evidence. Such being the procedure outlined by the statute it can make no difference whether the valuation is fixed by one or more judges or juries just so long as the opportunity to present the facts to a judicial body is afforded the Appellee, together with the full right of appeal from any such judgment or judgments.

It is next contended that Appellee is to be deprived of compensation for extensions and betterments made to the property during litigation by fixing the valuation as of date of summons.

Such an argument presupposes the power in the Corporation Commission to require such extensions and betterments to be made during the time the property is in custodia legis.

Many courts have affirmed the fixing of the valuation as of the date of the summons.

Wiser Valley Land and Water Co. v. Ryan, 190 Fed. 417.

Brown v. United States, 263 U. S. 78, 68 L. Ed. 171.

Central Nebraska Public P. & In. Dist. v. Fairchild, 126 F (2d) 302.

City of Los Angeles v. Goger, 10 Cal. A. 378, 102 Pac. 17.

City of Oakland v. Wheeler, 34 Cal. A. 442, 168 Pac. 23.

Municipal Water Dist. v. Marine Water & Power Co. et al, 178 Cal. 308, 173 Pac. 469.

The final contention of Appellee in reply to Appellant's proposition of law number one is to the effect that the proposed taking violates due process for the reason that no relief is afforded it in the event it cannot obtain the value of the property fixed by the judgment.

Appellee evidently has overlooked the fact that it is not entitled to any compensation until and unless the property is taken.

Section 16-604, *Arizona Code* 1939 *Anno.*

and no final order of condemnation can be made until the judgment is satisfied.

Section 27-919, *Arizona Code* 1939 *Anno.*

It may be that a public utility being operated for private profit should not be subjected to any business hazards such as the right of a municipality to institute con-

demnation proceedings for the acquisition of its properties, but it is submitted that the right of condemnation is and has always been a prerogative of the state and that in the instant case an exercise of that prerogative with a requirement of just compensation being first made in the event of a taking is not a denial of due process but merely a hazard to be considered when private enterprise engages in business as a public utility.

II.

Appellant is of the opinion that its argument as set forth in its Opening Brief in support of proposition of law number two is a sufficient reply to Appellee's contentions on said proposition with the exception of the point made on page 42 of Appellee's brief to the effect that a municipality in Arizona may not condemn utility property serving another municipality.

In support of this contention Appellee relies upon the Arizona case of Long, et al, v. Town of Thatcher, et al., 153 Pac. (2d) 153.

It should be noted that in the Thatcher case the City of Thatcher was attempting to purchase not only the physical property of the utility company which was operating within the town of Safford but it was also attempting to purchase, without the consent of the town of Safford, the franchise which the town of Safford had granted to the utility company, with the result that the town of Thatcher would have been operating in the town of Safford under a franchise from Safford which it had obtained without the consent of Safford. This the court said could not be done.

It can be readily seen that the case at bar is entirely different, for the reason that the Appelle is not operating under a franchise in any place, except within the corporate limits of Appellant, (Appellee's Brief page 42) and that no property rights of another municipality are involved. The same is true concerning the case cited by Appellee which was recently decided by this court but which has not yet appeared in the reporter system, Town of South Tucson v. The Tucson Gas, Electric Light and Power Company, No. 10921, Ninth Circuit of Appeals. In that case the town of South Tucson was attempting to condemn with other property a franchise granted by the City of Tucson and the court said it could not be condemned. In the instant case no property rights of any municipality are involved and it is submitted that in such a situation, the mere fact that the utility is operating within another municipality is not a bar to another municipality acquiring the property.

Crandall v. Town of Safford, 47 Ariz. 402, 56 Pac. (2d) 660, 663.

In conclusion Appellant presents that the complaint herein having stated a claim against Appellee upon which relief could be granted, the motion to dismiss should have been denied.

Respectfully submitted,

THOS. J. ELLIOTT,

Attorney for Appellant.